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No.: 99-902

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,
Petitioner,

vs.

OSVALDO ALMEIDA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RESPONDENT'S MOTION TO PROCEED IN FORMA PAUPERIS

RICHARD L. JORANDBY
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Chief, Capital Crimes Division

*Counsel of record

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23 pp

Respondent, OSVALDO ALMEIDA, asks leave to file the attached Brief in Opposition to the State of Florida's Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39.

Respondent's affidavit in Support of this Motion is submitted herewith. Mr. Almeida was declared to be indigent at the trial level and he was represented by appointed counsel at the trial level. He was declared indigent for appellate purposes and was represented by undersigned counsel, an Assistant Public Defender. He has remained incarcerated throughout the entire proceedings. He was incarcerated in the Broward County, Florida, jail while awaiting trial. Since his conviction he has been continuously incarcerated at Florida State Prison, Union Correctional Institution, or at the Broward County Jail. Thus, he remains indigent.

Mr. Almeida respectfully requests this Honorable Court to allow him to proceed in forma pauperis.

Respectfully submitted,

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GARY CALDWELL
Assistant Public Defender
Florida Bar No. 256919

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RESPONDENT'S AFFIDAVIT OF INDIGENCY

RICHARD L. JORANDBY
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(561) 355-7600

Gary Caldwell*
Assistant Public Defender
Chief, Capital Crimes Division

*Counsel of record

I, OSVALDO ALMEIDA, being first duly sworn, depose and say:

1. I am the Respondent in the above-styled cause.
2. In support of my Motion For Leave to Proceed In Forma Pauperis and waive any fees or costs therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that among the issues which I desire to present in response to the petition is that the petition presents no basis for reversing the decision of the state supreme court.
3. I further swear that the following statements relating to my ability to pay the cost of prosecuting the petition are true:
   a. I am not now employed and have not been employed since my incarceration began in 1993.
   b. In the past twelve months, I have not received any income from any form of business, profession, or employment, rent, dividends, interest, or any such source.
   c. I have no savings or checking accounts except a prison inmate account. The current balance of that account is $ 723.00.
   d. I own no real estate, stocks, bonds, notes, automobiles, or any other valuable property.
   e. No people are dependent on me for support.
4. I understand that a false statement in this affidavit will subject me to penalties for perjury.

Osvaldo S. Almeida

Osvaldo Almeida

SUBSCRIBED AND SWORN To before me this
2nd day of December, 1999.

Susan Cary

NOTARY

My commission expires:

Susan Cary
MY COMMISSION # CC852618 EXPIRES
July 6, 2003
BONDED THRU TROY FAIN INSURANCE, INC.

STATEMENT OF PRISON ACCOUNT

The business records of Union Correctional Institution, Raiford, Union County, Florida, indicate that Osvaldo Almeida #124330 has a balance of $ 723.66 as of this date.

Karen Sale
(Name)

Accountant IV
(Title)

12/1/99
(Date)

Inmate No.: 124330 Status: A Card No.: 1
Last Name: ALMEIDA Race: W
First Name: OSVALDO Sex: M
Middle Name: SS#: 012-70-6835
Date of Birth: 11/08/1973
AKA: ALMEIDA, OSVALDO
Opened: 06/11/1998 Facility Loc: 213
Closed: Housing Loc: P5126S
P.O.Box: A1
Balance: 723.66
Non-Medical Hold: 0.00
Avail. Canteen Bal.: 44.19
Medical Hold: 0.00

Hold Amt	Hold Date	Typ
0.00		
0.00		
0.00		

Date	Descript	Remitter/ Payee	Batch/ Dep. No.	Ref. No.	Rec. #	In/(Out)	Balance
05/30/1999	Beg Bal						726.86
06/04/1999	Canteen					-3.38	723.48
06/05/1999	Canteen					-34.27	689.21
06/07/1999	Canteen	Void				3.38	692.59
06/12/1999	Canteen					-11.68	680.91
06/20/1999	Canteen					-3.38	677.53
07/03/1999	Canteen					-35.16	642.37
07/10/1999	Canteen					-0.82	641.55
07/13/1999	Withdrawal	CHRISTIAN		97112	155827	-75.62	565.93
07/16/1999	Deposit	ALMEIDA,	2565	611072	156478	100.00	665.93
07/17/1999	Canteen					-6.20	659.73
07/24/1999	Canteen					-4.58	655.15
07/26/1999	Withdrawal	MERRIAM-W		97362	157326	-27.95	627.20
07/31/1999	Canteen					-0.41	626.79
08/07/1999	Canteen					-0.81	625.98
08/14/1999	Canteen					-4.11	621.87
08/16/1999	Withdrawal	EDWARD R.		97691	160083	-15.60	606.27
08/17/1999	Withdrawal	INMATE WE		97711	160177	-2.74	603.53
08/21/1999	Canteen					-2.08	601.45
08/28/1999	Canteen					-14.60	586.85
08/31/1999	Withdrawal	WORLD ALM		97937	161606	-14.66	572.19
09/04/1999	Canteen					-0.81	571.38
09/11/1999	Canteen					-25.79	545.59
09/22/1999	Withdrawal	WORLD ALM		98067	163688	-30.44	515.15
09/22/1999	Deposit	ALMEDIA O	2655	374643	163760	100.00	615.15
10/02/1999	Canteen					-0.81	614.34
10/09/1999	Canteen					-3.04	611.30
10/16/1999	Canteen					-4.13	607.17
10/23/1999	Canteen					-16.59	590.58
10/30/1999	Canteen					-4.38	586.20
11/01/1999	Deposit	ALMEDIA O	5426	392995	167193	100.00	686.20
11/02/1999	Med W/D	Med Co-Pa		00015382	15101	-4.00	682.20
11/04/1999	Withdrawal	UDT-SEAL		98552	167556	-55.50	626.70
11/05/1999	Deposit	PRIMEDIA	5457	206333	168045	14.66	641.36
11/08/1999	Canteen					-0.81	640.55
11/13/1999	Canteen					-7.06	633.49

Date	Descript	Remitter/ Payee	Batch/ Dep. No.	Ref. No.	Rec. #	In/(Out)	Balance
11/18/1999	Deposit	ALMEDIA O	5502	416256	169362	100.00	733.49
11/20/1999	Canteen					-9.02	724.47
11/27/1999	Canteen					-0.81	723.66
11/30/1999	End Bal						723.66

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BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Should the Court review a state court ruling on a moot issue decided on state law grounds where petitioner presents to the Court its disagreement with the state court's factual findings and claims a conflict with a decision of the Court on a federal issue not decided by the state court?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 1

PROVISIONS OF LAW INVOLVED 1

STATEMENT OF THE CASE 1

ARGUMENT 2

CONCLUSION 10

TABLE OF AUTHORITIES

CASES PAGE

Almeida v. State, 737 So. 2d 520
(Fla. 1999) . . . . . i, 3

Brady v. Maryland, 373 U.S. 83
(1963) 4

Calderon v. Moore, 518 U.S. 149
(1996) 2

Davis v. United States, 512 U.S. 452
(1994) 3, 8

Hernandez v. New York, 500 U.S. 352
(1991) 7

Mills v. Green, 159 U.S. 651
(1895) 2

Norvell v. Miller, 476 U.S. 1126
(1986) 4

Pelfresne v. Village of Williams Bay, 917 F.2d 1017
(7th Cir. 1990) 2

Simon v. State, 5 Fla. 285
(1853) 3

Texas v. United States, 523 U.S. 296
(1998) 2

Traylor v. State, 596 So. 2d 957
(Fla. 1992) 4

United States v. Callwood, 66 F.3d 1110
(10th Cir. 1995) 2

UNITED STATES CONSTITUTION

Article III 2

FLORIDA CONSTITUTION

Article I, section 9 . . . . . 1, 3

JURISDICTION

The state supreme court denied rehearing on August 30, 1999, so that the petition is timely filed. The decision did not decide any federal issue. Hence, there is no jurisdiction under 28 USC 1257.

PROVISIONS OF LAW INVOLVED

Section III of the Constitution provides in pertinent part:

> Article 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority ... .

Article I, section 9 of the Florida Constitution provides:

> No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

STATEMENT OF THE CASE

The state supreme court ruled in petitioner's favor that the admission of a statement was harmless error. In reaching this result, it ruled in dicta that the statement was inadmissible under Article 1, Section 9 of the state constitution. After listening to the taped statement, it made a factual determination that respondent posed an unambiguous question about the right to counsel to which the police did not respond appropriately under Florida law.

ARGUMENT

A. The petition presents a moot issue. Although the state supreme court found respondent's statement inadmissible, it refused to order a new trial. Since there will be no new trial, there is no effectual relief which this Court can give to petitioner. See Mills v. Green, 159 U.S. 651, 653 (1895), Calderon v. Moore, 518 U.S. 149, 150 (1996). Under Article III, federal courts may not "give opinions upon moot questions or abstract propositions". Id.

Page 3 of the petition attempts to get around this problem in a footnote to the Statement of the Case. Citing to no authority,[1] petitioner there suggests that review is warranted because it may be prevented from relying on the statement in the event that respondent seeks collateral relief.[2] A claim is not ripe for adjudication if it rests upon contingent future events that may or may not occur. Texas v. United States, 523 U.S. 296 (1998). It would be remarkable for the Court to expand Article III

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[1] "A litigant who fails to press a point by supporting it with pertinent authority, or by showing why it is sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. [Cit.] We will not do his research for him. [Cit.]" Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1023, (7th Cir. 1990); United States v. Callwood, 66 F.3d 1110, 1115, n.6 (10th Cir. 1995) (quoting Pelfresne).

[2] Thus, petitioner's position seems to be that the decision of the state supreme court is not a final judgment -- it is but one stage of proceedings which are expected to continue for an indefinite time into the future. Absent a final judgment, certiorari is inappropriate.

jurisdiction to find a viable case or controversy at bar on the basis of an argument in a footnote to the statement of the case in a petition for certiorari.

B. Although the petition claims jurisdiction under 28 USC 1257, it points to nothing in the state court decision which passed on a federal issue. The state court's discussion of respondent's statement is set out at pages A-17-22 of the appendix to the petition. It contains no mention of the federal constitution. There is at most a passing reference to Davis v. United States, 512 U.S. 452 (1994) in the middle of a quote from another state supreme court decision. Instead, the court explicitly based its decision on the companion case of Almeida v. State, 737 So. 2d 520, 527 (Fla. 1999), to which it referred as Almeida I. Appendix to petition, p. A-19.

The court noted that in Almeida I it had held that a confession obtained under the circumstances at bar "violates the Florida Constitution and cannot be used by the State." Appendix to petition, p. A-21.

Almeida I is based on the state court's interpretation of Article I, Section 9 of the state constitution. The supreme court traced its analysis back to its decision in Simon v. State, 5 Fla. 285, 296 (1853) which set out the standards for admission of a

defendant's confession under Florida law.[3] Almeida I, 737 So. 2d at 524. It then noted that, in Traylor v. State, 596 So. 2d 957 (Fla. 1992), it had "set forth a series of guidelines for use in Florida - similar to those announced in Miranda--that were designed to ensure the voluntariness of confessions" under Article I, Section 9. Almeida I, 737 So. 2d at 524-25 (e.s.). The court then concluded at page 525 (e.s.):

> Accordingly, we hold that if, at any point during custodial interrogation, a suspect asks a clear question concerning his or her rights, the officer must stop the interview and make a good-faith effort to give a simple and straightforward answer. To do otherwise -- i.e., to give an evasive answer, or to skip over the question, or to override or "steamroll" the suspect--is to actively promote the very coercion that Traylor was intended to dispel. A suspect who has been ignored or overridden concerning a right will be reluctant to exercise that right freely. Once the officer properly answers the question, the officer may then resume the interview (provided of course that the defendant in the meantime has not invoked his or her rights). Any statement obtained in violation of this proscription violates the Florida Constitution and cannot be used by the State. See Traylor, 596 So.2d at 966.

The state supreme court is the final expositor of state law. Norvell v. Miller, 476 U.S. 1126, 1128 (1986) (Burger, C.J., dissenting from denial of certiorari) ("The Florida Supreme Court, however, is the final expositor of Florida law, not the Eleventh Circuit."); Brady v. Maryland, 373 U.S. 83, 90 (1963) (opinion of

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[3] Needless to say, Simon not only precedes the incorporation of the Fifth Amendment by the Fourteenth Amendment - it precedes the Fourteenth Amendment itself.

Douglas, J., for the Court with one justice concurring) ("We usually walk on treacherous ground when we explore state law, [footnote omitted] for state courts, state agencies, and state legislatures are its final expositors under our federal regime."). At bar, the state supreme court has established a rule for admissibility of confessions in Florida under the Florida Constitution. The Court does not review decisions of state law.

If the Sunrise Police Department had a policy requiring that officers terminate interrogation under the circumstances at bar, the federal magistrate could not intrude and negate that policy. If the state attorney had a policy not to use confessions in such circumstances, there could be no review.

The state supreme court at bar has established just such a policy. It has placed a limitation on the power of the state government, which it was free to do. The Constitution preserves Florida's sovereign authority to put in place and enforce such a limitation on its government.

Our federal doctrine of comity bars the state's prosecutors from placing their disagreement with state law before the Court.

C. The petition seeks review of the state court's factual finding that respondent made an unequivocal question about his right to counsel which the detectives ignored.

The proposed question for review states (in part):

> WHETHER THE FLORIDA SUPREME COURT TOTALLY MISCONSTRUED DAVIS V. UNITED STATES, 512 U.S. 452 (1994), BY IMPROPERLY HOLDING THAT EQUIVOCAL QUESTIONS BY SUSPECTS DURING INTERROGATION, AS TO WHETHER THEY UNDERSTOOD THEIR RIGHTS ...

This case does not involve an "equivocal" question. The Florida Supreme Court made a factual finding that respondent's question was susceptible to but a single interpretation and that there was nothing equivocal about the exchange between respondent and the officer - the utterance was unequivocal:

> The type of utterance at issue here, on the other hand, was an unequivocal question that was prefatory to - and possibly determinative of - the invoking of a right and which cast doubt on the knowing and intelligent nature of the waiver. Detective Mink plainly asked Almeida if he wanted to proceed without a lawyer, and Almeida just as plainly asked the officer what good a lawyer would do. There was nothing equivocal about this exchange and certainly nothing unclear about Almeida's question - it was a simple, direct question, susceptible of but a single interpretation.

Appendix to petition, p. A-19-29 (quoting Almeida I).

The court explained in Almeida I that its fact finding was based on its de novo review of the transcript and of the audiotape itself:

> The audio taped version of the encounter sheds further light on the exchange. On the tape, Almeida had answered each of the preceding questions without hesitation and without equivocation, and then, when asked the above question, he came to an abrupt halt, paused for many seconds (about 5 seconds on the tape), and made a

pensive, probing response: "Well ... [pause] ... what ...[another pause] ... good is an attorney going to do?" It was a genuine question. It was not a rumination or a rhetorical question.[9]

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[9] Detective Mink testified that Almeida's question was "[a] comment, not a question," and the trial court found that the question was "no more than a rhetorical question at best. As such, it did not require a response from law enforcement." Both these views, however, are belied by the audiotape. The contents of the tape are unmistakable - Almeida asked a genuine question. The trial court had no special vantage point in reviewing this tape. Based on our review of the transcript and tape, we conclude that the record evidence is legally insufficient to support the trial court's finding. See generally Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981) ("Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.).

737 So.2d at 524 (e.s.).

Except in exceptional circumstances, the Court defers to state-court factual findings, even when those findings relate to a constitutional issue. Hernandez v. New York, 500 U.S. 352, 366 (1991). The petition asks the Court to ignore this rule: it poses a question based on facts contrary to the factual findings of the Florida Supreme Court. Petitioner fails to mention that the state court's fact finding was based on listening to the audiotape and, without likewise reviewing the tape, argues numerous times that the state court was incorrect in its review of the audiotape. Petitioner's claim is based on its view that there was an equivocal

utterance. This Court should not accept review to listen to an audiotape to determine whether the state court was correct in its factual finding regarding the utterance.

Petitioner's proposed question also is contrary to the decision in this case by claiming the Supreme Court of Florida misconstrued Davis v. United States, 512 U.S. 452 (1994) as applying to equivocal utterances. Petitioner fails to cite where the state court misconstrued Davis. The state court simply did not find that the facts in Davis (involving an equivocal comment) were identical to the facts in the present case (involving an unequivocal comment). Petitioner's real dispute is with the fact finding of the state court and not that the state court misinterpreted Davis. This Court should not review the question presented for review by Petitioner where it does not involve the facts or decision in this case.

D. The decision below does not conflict with Davis.

Petitioner claims that the state court wrongly failed to apply Davis to this case. This simply is not true.

The two cases involve opposite facts. In Davis, there was an equivocal utterance which was not required to be clarified by police. In the present case, the Florida Supreme Court made a factual finding that there was an unequivocal utterance. Thus, the two cases are based on opposite facts and are not in conflict.

The decision below did not misconstrue Davis. In fact, it only mentioned Davis in a quotation from another state court case. It distinguished that case and Davis on the ground that the unequivocal question at bar was different from an equivocal invocation of rights in those cases. The unequivocal question was made during the giving of Miranda warnings and not later on during the substantive interrogation about the crime. Thus, the "utterance at issue here, on the other hand, was an unequivocal question that was prefatory to - and possibly determinative of - the invoking of a right and which cast doubt on the knowing and intelligent nature of the prior waiver." Appendix to petition, p. 19-20 (quoting Almeida I). The court then decided that the resulting statement was inadmissible as a matter of state law.

There is no conflict between Davis and the instant case.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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